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IN THE

SUPREME COURT OF THE UNITED STATES

WILLIAM RILEY JENT,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 81-6549

RESPONSE TO PETITION FOR WRIT
OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

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QUESTIONS PRESENTED

I

Whether the Florida Supreme Court has declined to conduct the independent determination of the imposition of death sentence this Court in Proffitt v.Florida, 428 U.S.242 (1976) said that the state court must do, thus rendering Florida's death penalty statute, Section 921.141, Florida Statutes unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution?

II

Whether the trial court denied Jent due process of law when it ruled that witness Samantha Carver continued to have a Fifth Amendment privilege against self-incrimination for a murder charge which the state did not intend to charge her with committing?

OPINIONS BELOW

The opinion and judgment of the Supreme Court of Florida sought to be reviewed via this petition is reported as Jent v. State, 408 So.2d 1024 (Fla. 1981).

JURISDICTION OF THE SUPREME COURT

Respondent agrees that jurisdiction is properly invoked pursuant to 28 USC Section 1257(3) and the Court can exercise jurisdiction to the extent that a substantial federal question is presented.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war of public danger; nor shall any person be subject for same offen(c)e to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. The Eighth Amendment to the United States Constitution:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

3. The Fourteenth Amendment to the United States Constitution:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

4. Section 921.141, Florida Statutes (1980) as set forth in Appendix as A11-13 in the Petition.

STATEMENT OF THE CASE

An indictment filed in the Circuit Court for Pasco County on August 29, 1979, charged William Jent and his step brother, Ernest Miller, with the premeditated murder of a girl identified as "Tammy" (R.32-33). Subsequent to their plea of not guilty, they filed several pretrial motions.

The court granted a State Motion to Sever (R.139, 1667) and Jent proceeded to trial on December 17, 1979. (Miller was tried and convicted on November 15, 1979). He was convicted as charged (R. 891).

Subsequently, the court sentenced him to death (R. 897). The court found as aggravating circumstances that: (1) the murder was especially heinous, atrocious and cruel (R.892), and (2) it was committed in a cold,calculated and premeditated manner without any pretense of moral or legal justification (R.892). The court found in mitigation only that Jent had no significant history of prior criminal activity (R. 893).

Petitioner also filed a motion for a new trial (R.864-865) and an amended motion for a new trial (R.871-876) alleging that someone else had committed the murder. After considering the evidence presented at this hearing,the court denied the motion (R. 888-889).

The Florida Supreme Court affirmed the lower court's judgment and sentence, Jent v. State, 408 So.2d 1024 (Fla.1981). The court also denied a subsequent motion for rehearing (R.14).

STATEMENT OF THE FACTS

Respondent will rely on the facts as contained in the Florida Supreme Court opinion reported as Jent v. State, 408 So.2d 1024 (Fla.1981). Respondent would also rely on the following facts from the record:

The State presented three eyewitnesses who testified that they saw Petitioner beat and burn the victim:

(1) C. J. Hubbard:

While Miss Hubbard acknowledged that she had been drinking during the evening of the murder, she never admitted to be drunk as Petitioner suggests. A review of her testimony reveals that her recollection of the events that transpired was quite clear. Miss Hubbard was able to relate where she had been (R.1577,1578), who she was with (R.1578) and the events leading up to the murder (R.1581).

When Hubbard arrived at the river tressel, she went for a walk with John (R.1582). Shortly thereafter, Hubbard heard male screaming voices and someone say the word "bitch" (R.1582). Hubbard also heard the fearful screams of a female (R.1582). Hubbard paid no attention to this scream, because she simply figured the party was getting rowdy (R.1583). When Hubbard and Johnny returned to where the others were swimming, Hubbard saw Petitioner and Miller beating a girl in the face and on the back (R.1583-1585). The victim appeared to be unconscious (R.1585). At this point, Miss Hubbard did not attempt to stop Petitioner because she was afraid and felt that the same thing would have happened to her if she had interfered (R.1586). Glenna Frye was standing on the bank of the river at the time (R.1586-1587). Hubbard did not see Patricia Tirikaine (R.1587). After the beating, Miller suggested that everyone leave (R.1587). They got in his car and drove to his house (R.1594). Afterwards, George

Tricia, Glenna, Miller, Petitioner and Samantha drove to the Richloam game preserve in Miller's car (R.1594-1595). Hubbard saw Miller pour gasoline over the girl's body. The next thing she saw was the girl's body going up in flames (R.1595-1596). Petitioner, Samantha and Miller were standing around her (R.1586).

While Miss Hubbard's story changed before trial, she testified that the reason for this was that she was afraid of Petitioner and what he might do to her (R.1486,1610).

2. Patricia Tirikaine.

Patricia Tirikaine testified that she drove to the railroad tressel on July 13, 1979 with Miller and Glenna Frye (R.1612-1613). Petitioner, Ricky and Samantha Carver were already at the river when they arrived (R.1613). Miss Tirikaine testified that later that evening she observed Petitioner punching a girl in the face with his fists (R.1614-1616). She also observed Petitioner hit her with a stick on two occasions (R.1614,1617-1618). Petitioner was using words like "bitch" and "mother fucker" while he was punching and hitting her (R.1617). After Petitioner hit the victim with the stick the second time, he said she was dead (R.1619). While Miss Tirikaine was sick that evening, she was not sick at this time (R.1620). When they drove to Miller's home, Miss Tirikaine began to feel ill and started to throw up (R.1620-1621). Sometime thereafter, they drove to the game preserve and she saw Petitioner and Miller go to the back of the car (R.1621). The next thing she saw was Petitioner and Miller carrying the body of the girl they beat up into the woods (R. 1822,1831). Miller poured some kind of liquid on the body and then Tirikaine saw flames (R.1622). Petitioner was standing right next to the body (R.1622).

While Miss Tirikaine admitted to getting drunk on the evening of the murder, she did not get sick until after they left the railroad tressel. Her recollection of the events was quite clear and in no way conflicts with the testimony of Miss Hubbard. Miss Tirikaine never made mention of the rape at Miller's house, however, this is easily explained. Tirikaine got sick shortly after they left the railroad tressel (R. 1620-1621).

3. Glenna Frye:

Miss Frye testified that on the evening of the murder she went to the tressel with Miller, Petitioner, George, Samantha and Ricky (R.1637). Petitioner, Samantha and Ricky remained at the river while Miller, George and Frye went to the Caboose and Jackies Pub (R.1636). They were joined by Johnny, Patricia and C.J. Hubbard (R.1638). When they went back to the tressel, Samantha got in a fight with a girl by the name of Tammy (R.1641). Petitioner grabbed Tammy and started hitting the girl in the face with his fist (R. 1643). Petitioner was calling her a "bitch" and other assorted names (R.1643). Frye did not attempt to stop them because she was too afraid to move (R.1643). Miller then looked at her and told her to give him a stick (R.1644). Frye did as Miller requested because she was afraid (R.1644). Frye saw Miller strike Tammy with the stick (R.1644). While she did not see Jent strike her with the same stick, she could not watch the whole time because she was afraid (R.1644). Miller and Petitioner carried Tammy to the car (R.1645). They all then drove to Miller's house (R.1649). Miller got out of the car and went to the trunk while the rest of the group went into the house (R.1666). Sometime thereafter, Miller came into the house and told everyone they were leaving (R.1660).

Miller then opened the trunk of the car and he and Petitioner got Tammy out (R.1666). They laid her on the trunk lid and Miller proceeded to undress her (R.1660). Miller and George had sex with her first (R.1667). While C.J. was standing beside her, Frye did not know how much C.J. could see (R.1668). At the time, Patricia was also present, however, she was throwing up (R.1668). Frye did not try to stop them because she was afraid (R.1669). Petitioner performed oral sex on Tammy and then had sexual intercourse with her (R.1669). Frye testified that the girl Petitioner raped was the same girl that was beaten at the railroad tressel (R.1670). After Johnny had sex with Tammy, they put her body back in the trunk and everyone drove to the game preserve (R.1671). On the way to the game preserve, Frye learned that the fight between Samantha and Tammy was over Petitioner (R.1672). When they reached the game preserve, Miller told everyone to get out of the car (R.1673). Miller then opened the trunk and he and Petitioner carried Tammy's body over to the driver's side of the car (R.1673). When they laid her down, Miller poured gas on her (R.1673). As Tammy attempted to get up, Petitioner hit her again (R.1673). The next thing Frye observed was Petitioner and Samantha with fire in their hands (R.1674). When Frye heard Patricia scream, she turned around and saw that Tammy was burning (R.1674). Patricia was screaming because she thought something was going to happen to her (R.I675).

While Frye admitted to having used a substance called Crystal Tea on the day of the killing, she testified that this substance merely gave her more energy (R.1683-1685). Frye also admitted using marijuana during the day, but she then added that it was not very good and they did not get high

while they were smoking (R.1689). As for Frye giving two different versions of what transpired that evening, she also indicated that she originally had been afraid to tell what happened (R.1693).

4. James Boone:

James Boone shared a cell with Petitioner. Boone testified that Petitioner told him that he had sexual intercourse with Tammy (R.1719,1721). Boone also testified to the details of the beating and the burning (R.1668-1670).

ARGUMENT

ISSUE I

THE FLORIDA SUPREME COURT HAS DECLINED TO CONDUCT THE INDEPENDENT DETERMINATION OF THE IMPOSITION OF DEATH SENTENCE THIS COURT IN PROFFITT V. FLORIDA,428 U.S.242 (1976) SAID THE COURT MUST DO. THUS RENDERING FLORIDA'S DEATH PENALTY STATUTE, SECTION 921.141, FLORIDA STATUTES, UNCONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONTITUTION. 1/

In Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981), the Florida Supreme Court stated what its review function would be in death cases:

> ". . .The Court's role after a death sentence has been imposed is "review," a process qualitatively different from sentence "imposition." It consists of two discrete functions. First, we determine if the jury and judge acted with procedural rectitude in applying section 921.141 and our case law. . ."
>
> "The second aspect of our review process is to ensure relative proportionality among death sentences which have been approved statewide. After we have concluded that the judge and jury have acted with procedural regularity, we compare the case under review with all past capital cases to determine whether or not the punishment is too great.

1/ Petitioner states at page 12 of his petition that the heinousness of the murder was the only aggravating factor the trial court found to exist. This is incorrect. The trial court also found that the murder was committed in a cold, calculated and premeditated manner without any moral or legal justification

Proffitt v. Florida, 428 U.S.242, 96 S. Ct. 2960, 49 L.Ed2d 913 (1976); *State v. Dixon*, 283 So.2d 1 (Fla.1973), *cert. denied*, 446 U.S. 943,94 S.Ct. 1950,40 L.Ed2d 295 (1974). . ."

> Neither of our sentence review functions, it will be noted, involves weighing or reevaluating the evidence adduced to establish aggravating and mitigating circumstances. Our sole concern on evidentiary matters is to determine whether there was sufficient competent evidence in the record from which the judge and jury could properly find the presence of appropriate aggravating or mitigating circumstances. If the findings of aggravating and mitigating circumstances are so supported, if the jury's recommendation was not unreasonably rejected, and if the death sentence is not disporportionate to others properly sustainable under the statute, the trial court's sentence must be sustained even though, had we been triers and weighers of fact, we might have reached a different result in an independent evaluation.
>
> It is not the function of this court to cull through what has been listed as aggravating and mitigating circumstances in the trial court's order, determine which are proper for consideration and which are not, and then impose the proper sentence. In accordance with the statute, the culling process must be done by the trial court.

Mikenas v. State, 367 So.2d 606,610 (Fla. 1978); Accord, *Hargrave v. State*,366 So.2d 1 (Fla. 1978), *cert. denied*, 444 U.S.919,100 S.Ct.239,62 L.Ed2d 176 (1979).

See also Smith v. State, 407 So.2d 894 (Fla.1981).

The Florida Supreme Court's decision in Brown, supra, was before this Court by way of a Petition for Writ of Certiorari which was denied on November 2, 1981, Brown Wainwright, ___U.S.___, 70 L.Ed 2d 407, 102 S.Ct. 542 (1981). If Florida's application of the death penalty statute no longer met the dictates of Proffitt v. Florida, supra, this Court could have accepted certiorari at that time.

Petitioner attempts to rely on the Florida Supreme Court's decision in Tibbs v. State, 337 So.2d 788 (Fla.1976).

which held that the reviewing court could reweigh the evidence used to convict a defendant. Petitioner's reliance is misplaced. Respondent would point out that the Florida Supreme Court receded from this opinion, holding that its proper function is to review not reweigh the evidence. See Tibbs v. State, 397 So.2d 1120 (Fla. 1981). This was clearly the perogative of the state court to determine how the law should be applied, Wainwright v. Stone, 414 U.S.21,38 L.Ed 2d 179, 94 S.Ct. 190 (1973). Respondent would also point out that the Tibbs I applied to the guilt phase of the trial. Petitioner's attempt to apply this case to the sentencing phase of the trial is clearly in error.

ISSUE II

WHETHER THE TRIAL COURT DENIED JENT DUE PROCESS OF LAW WHEN IT RULED THAT WITNESS SAMANTHA CARVER CONTINUED TO HAVE A FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION FOR A MURDER CHARGE WHICH THE STATE DID NOT INTEND TO CHARGE HER WITH COMMITTING. 2/

Petitioner contends that the State sought to suppress Samantha Carver's testimony by raising the possibility that it may at some time in the future charge her with murder. Petitioner's contention is totally without merit.

While a criminal defendant ". . .has a right to everyone's evidence" unless some privilege conditions that duty, United States v. Mandujano, 425 U.S.564, 48 L.Ed.2d 212, 96 S.Ct.1768 (1976), it is important to note at the outset that it was not the State who objected to Petitioner's attorney deposing Miss Carver. Carver, upon the advice of her own counsel, asserted her right to remain silent and

2/ The issue as framed in the Florida Supreme Court was whether or not the trial court erred in denying Petitioner's motion for continuance so that he could depose Samantha Carver. Petitioner is not directing this Court in a different direction. In Cardinale v. Louisiana, 394 U.S.437, 22 L.Ed.2d 398, 89 S.Ct. 1162 (1969), this Court stated that it would not decide federal constitutional issues raised for the first time on review of State court decisions.

refused to be questioned (R.1976-1977).[3/]

Carver had pled nolo contendere to accessory after the fact, for aiding Petitioner in his escape and preventing his lawful conviction (R.1987). She had not yet been adjudicated and sentenced on this charge (R.1980). Petitioner suggests that the State granted Carver immunity from prosecution for any higher crime based upon the facts surrounding this incident. This is simply not the case. The State Attorney told the court that if sufficient evidence were to become available, the State intended to go to the Grand Jury and seek an indictment against her for murder (R.1984).

> "MR. COPE: Judge, as a matter of the record, may I clarify the representation by Mr. Cole or Mr. Council was that the facts as they are now known and that should subsequent evidence become available, the State has the absolute ability to go forward and to go to a grand jury to ask for an indictment for murder one should subsequent evidence become available, but as the facts are and as they are now known, we did agree to that because there was not and is not sufficient evidence to charge her with anything else at this point.
>
> (R.1983-1984)

Since accessory after the fact is not a lesser included offense of murder, c.f. Newkirk v. State, 222 So.2d 435 (Fla. 3d DCA 1969), the State would be in a position to institute further proceedings against Miss Carver for murder.

Petitioner cites Brady v. Maryland, 373 U.S.83,10 L.Ed.2d 215, 83 S.Ct.1194 (1963) for the proposition that it is a violation of due process for the State to suppress material evidence requested by the defendant.[4/] Brady, supra is totally

3/Petitioner concedes at page 14 of his petition that Miss Carver had a legitimate Fifth Amendment privilege to exercise.

4/The State initially furnished Miss Carver's name to Petitioner in discovery simply because other witnesses indicated that she was present at the time of the crime (R.1981). The state had no intention of calling Miss Carver as a State witness (R.1981,1991) and she was not called by the State to testify. The State was not aware that Miss Carver possessed inculpatory or exculpatory information as to Petitioner (R.1991). The only statements Carver made were to the police and in those statements she indicated that she did not know or remember anything (R.1981,1991-1992).

inapplicable to our factual situation. The State did not coerce Miss Carver to invoke her Fifth Amendment privilege. There was no promise by the State to grant Miss Carver immunity. As previously noted, the State allowed her to plead nolo contendere to the accessory charge because they did not have sufficient evidence to prosecute her for murder. If facts ever arose, the State indicated they would seek an indictment against her whether or not she testified at Appellant's trial. The State in no way attempted to suppress Miss Carver's testimony.

CONCLUSION

For the reasons stated, Respondent respectfully requests this Court to deny writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U. S. Mail to David A. Davis, Assistant Public Defender, 495 N. Carpenter Street, Bartow, Florida 33830 on this the 14th day of May, 1982.

Of Counsel for Respondent